No. 91-961

In the Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL CHEMICAL COMPANY, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioners were joint employers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A4) is unpublished, but the judgment is noted at 940 F.2d 1538 (Table). The decision and order of the National Labor Relations Board and the decision of the administrative law judge (Pet. App. A5-A69) are published at 297 N.L.R.B. No. 85.

JURISDICTION

The decision of the court of appeals was issued on August 19, 1991. The petition for a writ of certiorari was filed on November 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 1985, Hobbs and Oberg Mining Company, Inc. (Hobbs), began operating the Porter Coal Mine in Porter, Oklahoma. Hobbs contracted to sell the coal extracted from the mine to petitioner International Chemical Company (ICC) and another company not involved in this case. The agreement required Hobbs to sell a certain quantity and quality of coal to the two buyers at a specified price. Pet. App. A19. Since August 1985, Hobbs had recognized the Oklahoma Coal Miner's Union (the Union) as the exclusive bargaining representative of the production and maintenance employees at the mine. Hobbs was bound by the terms of a collective bargaining agreement that was in effect through August 1988. *Id.* at A14.

In late 1986, Hobbs began experiencing financial difficulties, and sometimes failed to deliver to ICC the quantity and quality of coal promised in the contract. Pet. App. A20. In early 1987, ICC began discussions with Hobbs about improving its production. ICC Vice President Kelly brought ICC agent Blevins to the Porter mine to serve as mine superintendent. In March, Hobbs entered into a management contract with Eastoak Coal Company (ECC), a subsidiary of ICC. On the orders of Kelley, who also served as ECC president, Blevins remained at the Porter mine to oversee the operations for ICC and ECC. *Id.* at A6-A7, A21-A22, A44. Blevins supervised employees' day-to-day activities, assigned work, and administered the collective bargaining agreement. *Id.* at A29-A35, A44-A46.

2. a. The NLRB General Counsel filed a complaint alleging that ICC, ECC, and Hobbs, as joint employers, engaged in various unfair labor practices in connection with the operation of the Porter mine. The ALJ found, and the Board affirmed, that, prior to May 31, 1987, ICC and ECC (the Companies) were joint employers, for labor relations purposes, of the production and maintenance employees at the mine. Pet. App. A6, A59. The Board found that, as joint employers, both Companies were liable for violations of Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158 (a)(3) and (1), by closing the mine and terminating all employees on May 31, and then reopening it under a sham subcontracting arrangement that gave ECC control of the mine as part of a collusive scheme to evade the collective bargaining agreement between Hobbs and the Union. The Board further found that the Companies unlawfully refused to rehire two former mine employees who applied to work at the reopened mine. Pet. App. A8-A9, A59. Finally, the Board found that the Companies violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union, when, after the reopening of the mine, they withdrew recognition, repudiated the collective bargaining agreement, and unilaterally changed wages, hours, and terms and conditions of employment. Pet. App. A59-A60.

b. With respect to the finding that the Companies operated as joint employers at the mine, the ALJ pointed out that "the joint employer concept recognizes that the business entities involved are in fact, separate, but that they share or codetermine those matters governing the essential terms and conditions of employment." Pet. App. A43. The ALJ further noted that "[t]o establish joint employer status, there must be a showing that the alleged joint employer meaningfully affects matters relating to the employment relationship such

as hiring, firing, discipline, supervision and direction." *Ibid.* Here, the ALJ found that Blevins, as the representative of both ICC and ECC (*id.* at A29), acted as general mine superintendent and exercised "pervasive control" over the employees' working conditions. *Id.* at A47. The ALJ concluded that, before May 31, "in fact and practice Hobbs relinquished the lion's share of [] control [over matters affecting its employees] to ICC and ECC." *Id.* at A48.[1]

In upholding the ALJ's findings, the Board relied on Blevins' statement to employees that he was in charge, on his role in resolving a contractual pay dispute with the Union, and on his participation in a work assignment dispute. Pet. App. A6. The Board also agreed that ICC operated as a joint employer at the mine even though Hobbs' management contract was with ECC. The Board observed that Kelley, in his capacity as an officer of ICC, assigned Blevins to work at the mine, and that ICC continued to be involved with the mine after the management agreement between Hobbs and ECC was executed on March 24. *Id.* at A47.

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[1] Before the ALJ (Br. 22-23) and the Board (Br. 32-35), petitioners argued that, even if ECC and Hobbs were found to be joint employers, ICC could be found liable only if it and ECC were a single employer. In rejecting this contention, the ALJ noted that the single employer and joint employer "concepts are distinct from one another," Pet. App. A41, and explained that single employer status "depend[s] on the existence of a single integrated enterprise." *Id.* at A42. See also *id.* at A41 (citing *NLRB* v. *Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982)). The ALJ observed, however, that the General Counsel never contended that ICC and ECC constituted a single employer, but rather, relied on the theory that ICC and ECC were responsible for employment matters at the Porter mine as joint employers. Pet. App. A16. The ALJ agreed with the General Counsel that the Companies satisfied the criteria for joint employer status, and therefore did not decide whether they might qualify as a single employer as well.

3. The court of appeals affirmed the Board's decision and order in an unpublished opinion. Pet. App. A4. The court agreed with the Board that "ICC [had] placed its employee, Mr. Blevins, in charge of the mine" prior to its closing. The court also found that the mine remained in the Companies' control after it reopened. *Id.* at A3-A4. On the basis of those findings, the court concluded that there was "substantial evidence to support the findings of the ALJ and the NLRB" that the Companies were liable as joint employers. *Id.* at A4.

ARGUMENT

This Court has stated that employers operating as distinct business entities may be considered joint employers under the National Labor Relations Act if they "possess sufficient[] control over the work of the employees." *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964). As petitioners acknowledge (Pet. 3), the Board applies the same test for joint employer status. See generally *W.W. Grainger, Inc.*, 286 N.L.R.B. 94, 95 (1987); *Chesapeake Foods, Inc.*, 287 N.L.R.B. 405, 407 (1987). Petitioners' principal objection to the decision below is that the Board should not have characterized the Companies as joint employers on the facts of this case. Petitioners' contention is without merit: the evidence fully supports the Board's finding that the Companies shared control over the work of the employees. On the basis of that finding, the court of appeals correctly upheld the Board's determination that the Companies were liable as joint employers. That decision does not merit further review by this Court.

1. Under Board precedent, two companies can be held liable for a single violation of the Act if they were operating as a single employer or as a joint employer. See Pet. 3, and decisions cited therein. Petitioners suggest (Pet. 3-4) that the ALJ's findings of fact would have supported a conclusion that the Companies acted

as a single employer, but that the decision cannot be upheld on that theory because it was not raised by the Board's General Counsel at the hearing. Petitioners offer no reason why this procedural issue would support a grant of certiorari under this Court's rules. In any event, the Board's factual findings fully support the conclusion that the Companies could be held liable as joint employers.

Although the ALJ remarked in passing (Pet. App. A29, A44) that Kelley operated ICC and ECC as a single, integrated company, he based his conclusion that the Companies operated as joint employers at the Porter mine on the finding that Blevins acted as the agent of both Companies as separate entities. *Id.* at A44. Similarly, although the Board noted in passing "ECC's involvement at the policy level" in the operation of the Porter mine (Pet. 5), it relied on its determination that ECC, through Blevins, exercised "actual control over how the work of [the] employees is to be performed" (Pet. 4) in concluding that ECC and ICC were joint employers at the mine. The Board based its conclusion on the finding that Blevins, as the agent of the Companies, was actively involved with the employees' work performance and labor relations. Petitioners do not dispute that factual determination, which is supported by substantial evidence and is not clearly erroneous. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, the fact that ICC and ECC might also qualify as a single employer does not preclude the finding that they were joint employers. Here, both Companies satisfied the requirement—relevant to both the single and joint employer determination—of shared control over the employees' working conditions.

2. Petitioners also contend that various courts of appeals appear to examine different factors in evaluating joint employer status. Contrary to petitioners' con-

tention (Pet. 5-6), however, this case does not present any occasion for resolving any differences that might exist among the circuits concerning the joint employer determination. To be sure, the Eighth and Seventh Circuits have, on occasion, blurred the distinction between joint employer and single employer status by applying to joint employer determinations the four-factor test for single employer status formulated by the Board in *Parklane Hosiery Co.*, 203 N.L.R.B. 597, amended, 207 N.L.R.B. 991 (1973); Pet. 3-4. See *Pulitzer Publishing Co.* v. *NLRB*, 618 F.2d 1275, 1278-1279 (8th Cir.), cert. denied, 449 U.S. 875 (1980); *Sheet Metal Workers Union* v. *Public Service Co.*, 771 F.2d 1071, 1074-1075 (7th Cir. 1985). Nonetheless, there is general agreement among the courts of appeals that "sufficient evidence of immediate control over the employees" is the paramount consideration in making a finding that employers share joint responsibility under the Act. See *Clinton's Ditch Cooperative Co.* v. *NLRB*, 778 F.2d 132, 138 (2d Cir. 1985) (refusing to find joint employer status without evidence of "immediate control" over employees), cert. denied, 479 U.S. 814 (1986). Thus, although the Seventh and Eighth Circuits recite the more elaborate four-part test in some decisions, see *Pulitzer Publishing Co.* v. *NLRB*, *supra*; *Sheet Metal Workers Union* v. *Public Service Co.*, *supra*, those courts have, in practice, emphasized the factor of day-to-day control over employee affairs in concluding that a joint employer relationship exists. See, *e.g.*, *Industrial Personnel Corp.* v. *NLRB*, 657 F.2d 226, 228 (8th Cir. 1981), cert. denied, 454 U.S. 1148 (1982) (four-part test); but see 657 F.2d at 229 & n.3 ("We agree with the Board's finding that there is no common management, ownership or financial control but we find these facts are not crucial to our determination."); *NLRB* v. *C.R. Adams Trucking, Inc.*, 718 F.2d 869, 870 (8th Cir. 1983) (reciting four-part test in reliance on *Pulitzer Publishing*, but relying solely on

"control over the employment conditions" in finding that employers shared joint responsibility); *Ace-Alkire Freight Lines, Inc.* v. *NLRB*, 431 F.2d 280, 282 (8th Cir. 1970) (employers operated jointly because "[b]oth shared in the hiring process and both exercised control over the manner in which the men performed their duties"). See also *Davis* v. *NLRB*, 617 F.2d 1264, 1271-1272 (7th Cir. 1980) (in applying four-part test, focussing almost exclusively on lack of centralized management and control over labor matters); *Lutheran Welfare Services* v. *NLRB*, 607 F.2d 777, 778 (7th Cir. 1979) ("if two or more employers exert significant control over the same employees, they constitute 'joint employers' under the NLRA").[2] Petitioners have failed to demonstrate, in light of these cases, that the joint employer issue would be decided differently in any other circuit on the facts of this case.

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[2] *Sheeran* v. *American Commercial Lines, Inc.*, 683 F.2d 970, 978 (6th Cir. 1982) (see Pet. 6), is inapposite; the Sixth Circuit in that case made a finding that the employers qualified as a single employer, not that they were joint employers. Petitioners also err in suggesting that there is any inconsistency between this case and the Board's decision in *Island Creek Coal Co.*, 279 N.L.R.B. 858 (1986). See Pet. App. A47 (discussing the factual distinctions between this case and *Island Creek*). In any event, even if there were a conflict between the court of appeals' decision and an unreviewed decision of the Board, this Court need not resolve it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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